**TESTIMONY**

**OF**

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**VICE CHAIRMAN**

**RCN CORPORATION**

**BEFORE THE**

**UNITED STATES SENATE JUDICIARY COMMITTEE**

**SUBCOMMITTEE ON ANTITRUST, BUSINESS RIGHTS, AND COMPETITION**

**WASHINGTON, D.C.** **APRIL 4, 2001**

Mr. Chairman and Members of the Subcommittee:

My name is Bob Currey. I am the Vice Chairman of RCN Corporation ("RCN"), which is one of the largest new competitive entities in the cable, or Multichannel Video Programming Distribution ("MVPD") industry. I am grateful for the opportunity to testify today before the Antitrust Subcommittee to give you my company's perspective on the state of competition in an industry which historically has been dominated by entrenched monopolists.

## I. INTRODUCTION

RCN, which was created in response to the pro-competitive policies adopted in the Telecommunications Act of 1996, is unique in a number of respects. We offer our customers a variety of bundled services, including competitive local exchange carrier and interstate telephone service, high speed internet access services and cable services. We focus our efforts on bringing competition to residential consumers. We are building out, and relying on, our own state-of-the-art broadband fiber optic cable network, an investment of many billions of dollars. We operate in the Northeast corridor, from Boston to Washington, D.C., and in the San Francisco, Los Angeles, and Chicago areas. Through our Resilink[SM] plan, we offer our customers the option of subscribing to one or more of our services. In respect to each we seek to provide higher value than the competition and, in addition, we offer discounts for those who participate in all three. The focus of my testimony today, however, is on the video aspect of our business and specifically on the state of competition in the cable, or MVPD marketplace. In such capacity we are frequently described as a "cable overbuilder."

Before describing RCN's business model and activities, let me briefly outline the state of the cable market as I see it. Given the very strong economies of scale and scope which exist in the construction, installation and servicing of a broadband facility, the cable industry has

historically been characterized by monopoly in any given area. There has been some minor competition in certain markets, coming from wireless (so-called SMATV and MMDS) operators, especially in large apartment buildings, but on the whole incumbent cable operators have accounted for virtually all of the market.[1/]

Competing with an existing cable operator in an urban area is not for the faint-hearted or the thinly-capitalized. Since passage of the Telecommunications Act of 1996, however, with its strong emphasis on encouraging competition in the telecommunications and broadband markets, and legislation addressing certain problems faced by the Direct Broadcast Satellite ("DBS") industry, competitive entry has taken root. In its January, 2001 annual survey of the MVPD industry, the FCC concluded that traditional cable now accounts for only 80% of the market, with DBS having captured some 15%, and other market participants, such as overbuilders of traditional cable systems and wireless operators, accounting for the remainder.[2/] The terrestrial wireless and DBS systems suffer from line-of-sight limitations which do not hinder RCN's fiber

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[1] In a very few markets cable-to-cable competition has existed for some years, for example in Allentown, Pennsylvania, in which RCN has been competing with another local franchisee for many years. Both companies have wired most of the community and most homes have immediate access to two sets of cable wires.

[2] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 7th Annual Report*, CS Docket No. 00-132, FCC 01-1, *rel.* January 8, 2001. According to the FCC, cable's share of the MVPD market has declined in 2000 from 82% to 80%, although the number of cable subscribers has grown from 66.7 million to 67.7 million. Non-cable MVPD subscribership has grown from 14.2 million to 16.7 million, an 18% increase. Most of this growth is attributable to DBS, whose share of total MVPD subscribers has grown from 10.1 million to 13.0 million, or 15.4 % of all MVPD subscribers. Local exchange carrier (telephone) participation in the MVPD industry is slowing; there is little OVS activity (less than .1%) and little cable participation in telephony.

optic based service. For that reason, it is particularly important for city dwellers to have access to a cable-based competitor like RCN.

Nevertheless, it is worth emphasizing that, even as modest competitive entry has been occurring, the cable industry has grown ever more concentrated, with the 10 largest multiple system owners ("MSOs") now accounting for some 52.5% of the market, and with the vertical integration of cable companies and programming vendors growing ever more concentrated.[3/] This continuing concentration expresses itself also geographically, through the development of "clustering," by which large, multiple system owners ("MSO"s) trade systems among themselves with the goal of concentrating an entity's ownership in one or a few areas, rather than having widespread but less market-dominant operations. The industry claims that this clustering allows it to undertake system and program upgrades, and no doubt it does. Unfortunately, it also has the effect of making a local cable company's entrenchment in a metropolitan area even more unassailable than it may have been before the clustering took place.

While this is not the place to recite the long and complex regulatory history of the cable industry, a few very brief observations are necessary to understand the current situation. The basic Communications Act of 1934, of course, had no reference to cable service, although in the

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[3] The Commission states flatly that the market for the delivery of video programming "continues to be highly concentrated and characterized by substantial barriers to entry which serve to increase the cost of potential entry into a rival's market." (¶ 137). The 7th Annual Report notes that the top four MSOs serve more than 50% of all subscribers: ATT (19.1%);T/W (14.9%); DirecTV (10.3%); and Comcast (8.4%). The Report notes also that the top 10 MSOs served 75% of the MVPD universe in 1999 but 84% in 2000. (¶ 169). One or more of the top five MSOs holds ownership interests in each of the 99 vertically integrated services. (¶ 174). Nine of the top 20 video programming networks ranked by subscribership are vertically integrated with a cable MSO. (¶ 175). A "significant amount" of video programming is controlled by only 11 companies, including cable MSOs. (*Id.*).

late 1950's and mid 1960's the FCC did take regulatory steps to protect the television industry from the rapidly growing power of cable operators. Congress itself did not specifically impose regulation on the cable industry until 1984, when it passed the Cable Communications Policy Act of 1984,[4] which established the basic federal regulatory scheme by which local franchise authorities have jurisdiction to authorize cable systems, subject to a limited degree of federal oversight. This legislation, however, only provoked growing concern about the monopolistic power of the cable industry and the need to impose some greater degree of regulation on it. As a result, the Cable Television Consumer Protection and Competition Act of 1992 was adopted.[5] This legislation followed three years of contentious congressional hearings, was heavily oriented toward regulation, and added to the FCC's authority to control cable's rates and practices in an effort to address widespread and vocal public concern about the economic power and poor service performance of the cable industry. Yet it too failed to quell rising unhappiness with the prices and services offered by the industry.

Accordingly, the Congress again addressed the issue in the Telecommunications Act of 1996 which contains a number of provisions specifically intended to encourage competitive entry into the MVPD market. The most important of these is section 653,[6] which creates a new mode of competitive entrant, known as an open video system ("OVS") operator. The OVS, a mixture of cable operator and common carrier, was designed by Congress to permit local exchange

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[4] Pub. L. No. 98-549, 98 Stat. 277 (1984), codified at 47 U.S.C. § § 521*, et seq.*

[5] Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified in scattered sections of Title VI of the Communications Act. *See* 47 U.S.C. § 521, *et seq.*

[6] 47 U.S.C. § 573.

telephone companies and others to enter the cable business, enjoy a reduced degree of regulation, and offer unaffiliated programmers the opportunity, in effect, to program their own small-capacity system, riding on a portion of the high capacity pipe installed by the OVS operator.

RCN has become the country's largest OVS operator,[7] and has entered local markets either as an OVS operator or as a traditional Title VI franchised cable company, depending on the circumstances in each community. Specifically RCN currently operates as an OVS in certain suburbs of Boston, in New York City, in Washington, D.C. and certain of its suburbs, as well as in South San Francisco. We are also developing traditional franchised cable operations in the Boston, New York, Philadelphia, Washington, D.C., San Francisco, Los Angeles, and Chicago metropolitan areas. Unfortunately, the OVS model has not proven as attractive as one might have hoped due to a variety of factors. These include a court decision which struck down the FCC's rule eliminating the need for local franchising of OVS systems, the hesitation and even reluctance of many local franchising bodies to put aside the traditional franchise as a regulatory model and to adopt the new OVS concept, and, in addition, certain regulatory decisions of the FCC which have had a chilling effect on the OVS approach by permitting local cable competitors, in certain circumstances, to require the OVS operator to divulge its service and operational plans to a local competitor.

Another of the procompetitive steps taken in the Telecommunications Act of 1996 was the amendment of section 224 of the Communications Act to compel pole-owning utilities to

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[7] Indeed, there exist no other significant OVS operations although Congress and the FCC intended OVS to be the primary source of facilities based competition to cable operators. *See, e.g., Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order*, 11 FCC Rcd 18223, 18259 (1996)(Subsequent history omitted).

make their poles accessible to cable companies and to telecommunications companies and to impose additional pro-competitive conditions on the utilities.[8] RCN has found it invaluable to have the benefit of this legislation. As a telecom entity which plans to build its own facilities to serve primarily residential customers, rather than the more limited universe of commercial subscribers targeted by the great majority of competitive local exchange carriers ("CLECs"), and as a cable competitor, RCN must run its facilities up every residential street and down every alley.

In Massachusetts, for example, we are currently on 72,000 poles and will require access to some 60,000 more. In Pennsylvania we are currently licensed for almost 16,000 poles and, ultimately, may need access to over 100,000. In Queens, New York, we are on 5,200 poles. This means that suitable access to poles is far more important to RCN than it is to other telecom competitors. Indeed, we have had to rely on the pro-competitive policies embodied in section 224 of the Communications Act to address circumstances in which RCN has been unable to secure what it deems just and reasonable terms for access to utility poles.[9] In both the Boston and Washington, D.C. markets RCN has entered into partnerships with affiliates of local power companies in part to assure access to utility poles.

Earlier, I noted that competing with entrenched monopolists is a daunting challenge. The entrant must be able to market its services against entrenched cable operators who have

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[8] 47 U.S.C. § 224(e), 224(f)(1).

[9] RCN has experienced difficulties securing access to the poles of Verizon in both Massachusetts and Pennsylvania. In the Philadelphia suburbs RCN has filed a formal Pole Access Complaint against the local power company, Exelon, alleging that Exelon's pole attachment fees are excessive, and in other respects unjust and unreasonable. *See RCN Telecom Services of Philadelphia, Inc. v. Exelon Corp*, PA No. 01-____, filed March 16, 2001.

substantial advantages in the competitive battle: name recognition, an embedded customer base, strong economies of scale, established relationships with local franchise and governmental authorities, a corporate presence in the community, and vertically integrated programming affiliates or established contracts for programming.

The new entrant has no captive subscribers; no initial revenue and enormous start-up expenses such as securing the local franchise. This latter process alone generally takes six months to a year. Local franchise authorities usually attempt to secure as high a price as possible for granting a franchise and typically require high standards of proof of a franchise applicant's financial and operational experience and capability. Multiyear construction commitments are normally required. Accordingly, the potential competitor must earmark funds, purchase long lead time items, enter into programming commitments, hire hundreds of employees in each market, and, most important, fight for each subscriber because the local citizens who want cable service are probably already customers of the incumbent. To use a well-worn metaphor, the low-hanging fruit has been picked. Installing fiber optic or coaxial cable throughout a community can cost tens to hundreds of thousands of dollars per mile. As a result, it has generally been thought that competitive MVPD service based on construction of a second local broadband distribution network is not sustainable financially[10/] and there has been relatively little of it, either before passage of the Telecom Act of 1996, or thereafter.

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[10] Typically, it is said that "[o]nce an incumbent system has captured a large share of the viewing public in a particular area, it is quite difficult for a new system to come into the market and offer potential subscribers as favorable pricing and viewing options as those available from the incumbent system." Piraino, A Proposal For the Antitrust Regulation of Professional Sports, 79 B.U.L. Rev. 889 (1999) at n. 387.

Of course, RCN also enjoys certain competitive advantages: its newly designed and installed fiber optic network is among the most advanced in the world,[11] it is able to offer bundled service combining local and long distance telephony, high speed Internet access, and broadband video from day one. Because it is not an incumbent cable operator it is not generally disdained or disliked by the general public, as are so many established cable companies whose reputation for poor service and high price is well deserved. In fact, almost without exception RCN has found that local franchise authorities and local residents enthusiastically welcome the introduction of a cable competitor.

In each of the markets in which we have made a bridgehead in spite of the numerous and daunting entry barriers, we have been able to fulfill the fundamental pro-competitive premise of the 1996 Act. This Subcommittee, of course, does not need to be persuaded that competition is a good thing, nor that competition in the video marketplace is both desirable and necessary. The continuous increase in customers' cable rates, typically well in excess of inflation, is a constant topic of concern.[12] Yet it is interesting to see the theory at work. Economic theory recognizes that the cable incumbents, who have enjoyed a quiet but very prosperous life for decades, do not welcome new competition.[13] Over the last three years we have been subjected to a barrage of

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[11] *See* Morgan Stanley Dean Witter Report, March 31, 1999. RCN has been rated number 2 out of 100 of the most innovative telecommunications companies in America. *See* Forbes ASAP Dynamic 100 List, April 5, 1999.

[12] *See, e.g.*, FCC 7th *Annual Report on Competition in Video Markets* (Jan. 2001), ¶ 155, reporting an overall increase in cable rates of 4.8% as compared with a CPI increase of 3.2%; Communications Daily, July 15, 1998, p. 2, reporting CPI data showing cable rate increases of 7.3% over the previous 12 months as compared with a 1.7% inflation rate.

[13] *See Predation In Local Cable TV Markets*, Antitrust Bulletin, 9/1/95 by T.W. Hazlett: "Cable television operators pursue a predictable set of reactions... to a potential CATV entrant.. .

anticompetitive activities by incumbent cable companies: we have been harassed by pleadings seeking the withdrawal of our OVS authority on various specious grounds -- pleadings filed both by individual cable companies and by cable trade associations. We have been subjected to multiple administrative proceedings instigated by the cable incumbent in Boston -- our first OVS market -- as well as litigation in federal court brought by the incumbent cable operator which the presiding judge urged be withdrawn because it was so lacking in merit. We have been denied access to critical programming by our video competitors both in Boston and New York and threatened with such denial in the Philadelphia area.

For any prospective competitor to have a meaningful chance to be commercially successful in introducing competition into a community served by an entrenched cable operator, whether or not that incumbent is one of the large vertically integrated multiple system operators, the competitor must have deep pockets, an ability to postpone profits for some years, the most modern technology, and the patience to negotiate franchise agreements and rights-of-way agreements with local governments, pole attachment agreements with local utilities, and all the associated real estate, employment, marketing and related business relationships. But all of these pale into relative insignificance compared with the need to acquire the product which is to appear on the screens of the competitor's subscribers.

Programming is of course essential to MVPD competition since in the absence of appealing programming nothing else matters. RCN is not aware that any participant in the

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beginning with a vigorous lobbying campaign to deny entry rights... selective price cutting, preemptively remarketing the first submarkets to be competitively wired... tying up cable network programming... delaying access to ... poles and/or underground conduits... and creating customer confusion...." *Id*. at 11.

MVPD industry disputes this proposition. Even the Commission has accepted its root importance: "A major component of the ability to compete with cable systems is the ability to secure programming. Ensuring fair and equitable program access is the key to fostering the development of vigorous multichannel competitors to cable."[14/] The general public does not know or care about technology, corporate structure, or abstract theories of competition. It cares only about the programming and the costs of that programming, and it is here – at this core issue – that RCN faces a key barrier to the successful implementation of its competitive services.

Of course, we anticipated resistance but to be candid the extent and intensity of that resistance – the prevalence of anticompetitive practices - has really surprised us. I hasten to add the important point that it has not deterred us but merely required allocating more time and resources to establishing ourselves in various local markets than we had initially anticipated.

[14] *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, Report, 5 FCC Rcd 4962 (1990) ("FCC 1990 Cable Report"), at ¶ 112.

## II. COMPETITIVE IMPROVEMENTS

With this brief background, let me turn to illustrations both of the advantages to the public of competitive entry and to the various difficulties we have encountered. RCN's introduction or announced introduction to a market benefits consumers because it leads the incumbent to improve its existing offering in one or more ways. Sometimes these are voluntary adjustments by the incumbent. Sometimes they occur in the context of a franchise renewal when RCN is awaiting the award of its own franchise, a process which gives the local franchise authority more leverage on the incumbent:

» **Somerville, MA**

Incumbent Time Warner announced rate freezes in Somerville, a Boston suburb, upon RCN's entry, even though it was raising rates in most of the eastern Massachusetts communities in which it was the franchisee by 10% to 15%.

» **Boston, MA**

The City was able to negotiate a franchise renewal with Cablevision which imposed obligations on the incumbent more favorable to the public than would otherwise have been possible because RCN was already operating in the city as an OVS. Cablevision agreed to increase its commitment to public, educational and government ("PEG") channels and increase the channel capacity of its system. Cablevision also moderated its regional rate increase in the Boston area because it faced competition from RCN.

» **New York City**

In Manhattan the incumbent, Time Warner, adopted an aggressive bulk discount plan for apartment buildings targeted for service by RCN.

» **Suburban Philadelphia**

As RCN has rolled-out its competitive cable and local telephone services in suburban Philadelphia communities such as Folcroft, the incumbent, Comcast, began offering rate locks and service improvements in towns to which RCN was offering or about to begin offering service. These special offers were highly selective, and focused specifically on the imminent arrival of RCN's competitive service.

» **Allentown, PA**

Allentown is one of the very few communities in the United States which has been served for 20 years by competitive cable companies. In Allentown the competitors are RCN and Service Electric. Both have almost fully built-out the city, so that most residences have two broadband wires available at each house. As a result of the competition, cable rates are significantly below the national average, and penetration is higher than the national average (approximately 90% of the city is wired by both companies). There are also fewer customer complaints on a percentage basis than the industry experiences nationally.

» **Washington, D.C. Metropolitan area**

RCN's affiliate in Washington, D.C., Starpower, has provoked dramatic changes in the offerings of incumbent cable operators, discouraging price increases and improving service offerings. Upon the announcement of Starpower's entry into the market, the D.C. incumbent's rate increases moderated from previously announced annual increases in the range of 7% to a mere 2% in 1998. Starpower's basic rate in Washington, D.C. is $31.95 for 96 channels and no installation fee. Comcast charges $33.87 for 56 channels with a $39.95 installation fee. In anticipation of competitive entry, Cox Cable announced that it would upgrade its cable to 860

MHz capacity in Fairfax County. In Prince George's County, Comcast announced an upgrade of its plant beyond its franchise obligation in light of Starpower's arrival. Comcast in Arlington announced a major overhaul of its channel line-up with significant additional channel capacity and digital upgrades to make its offerings more competitive with newly-franchised Starpower.

» **In General**

The FCC has broadly addressed this issue in its annual reports on the status of competition in the MVPD market.[15/] Typical observations are the following: "[C]ompetition often results in lower prices, additional channels, improved services, or additional non-video services."[16/] "Generally, we find that in communities where head-to-head competition is present, the incumbent cable operator has responded to competitive entry in a variety of ways, such as lowering prices, providing additional channels at the same monthly rate, improving customer service, adding new services including high speed Internet and telephone services, or by challenging the legality of the entrant's activities."[17/]

## III. OPPOSITION FROM INCUMBENT CABLE OPERATORS

Almost without exception RCN has found that incumbent cable operators will attempt to inhibit, delay, complicate or, if possible, preclude altogether competitive entry. Such obstinance

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[15] *See, e.g.*, *Fourth Annual Report, Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034 (1998), at ¶¶ 131-132; *Fifth Annual Report*, 13 FCC Rcd 24284 at ¶¶ 121 and 136-137, and *Sixth Annual Report*, 15 FCC Rcd 978 at ¶¶129-133; *Seventh Annual Report*, *supra*, at ¶ ¶ 213-238.

[16] FCC, *Seventh Annual Report* at ¶ 39.

[17] *Id.*, at ¶ 213.

deprives consumers of the benefits of competition and should not be tolerated by policy makers. Among RCN's experiences is the following:

» **In General**

RCN has seen a troubling trend among incumbents to consolidate their holdings in a limited number of metropolitan areas, *i.e.* to "cluster," and then to build a fiber distribution network in those communities. The advantage of using fiber optic distribution is that the FCC has held (wrongly, in our view) that the program access provisions of section 628 of the Cable Act of 1992 do not apply to any programming not distributed by satellite. With clustering, the economics of fiber distribution becomes more practical, allowing the incumbent to evade the provisions of section 628 of the Act by buying the rights to local professional sports programming and refusing to share that programming with competitors. This is what Cablevision has done to RCN in New York City, and is what Comcast threatened to do to RCN in Philadelphia.

In the Washington, D.C. area, in which Comcast has the dominant position, it refused the request of a member of the Arlington, Va. County Board to agree in principle to make its vertically integrated programming available to competitors but appears to have been deterred from curtailing access to Home Team Sports, now renamed "Comcast SportsNet," because the Justice Department carefully reviewed Comcast's proposed acquisition of that programmer and negotiated an agreement with Comcast. Local sports programming is critical to entrants because many consumers subscribe to cable programming solely or primarily to view such programming;

many consumers will not switch providers without it.[18] Starpower also has been as yet unable to secure the rights to carry certain other programming, including News Channel 8 and MSNBC, due to claims of exclusivity. Clearly the public is not served by its inability to view those channels on Starpower's system.

» **Boston, MA**

In Boston the incumbent refused to make certain programming it controlled available to RCN. It also attempted to use the FCC's OVS rules to pry proprietary and confidential data from RCN concerning its market plans. The FCC rejected the effort. The incumbent also filed suit in Federal Court against the City of Boston and RCN's Boston affiliate to try to delay the build out of RCN's competitive system.[19] The incumbent refused to share its cable inside wiring with

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[18] RCN's business plan anticipates a penetration rate of about 30% of the homes it passes in each market it builds out. As the surveys it has taken indicate, approximately 40-58% of any local market would essentially be impenetrable to an overbuilder if it lacked access to the bulk of local sports programming. The result would be a penetration rate of about 15%, a rate so low that no entrepreneur would be willing to risk the hundreds of millions of dollars required to overbuild an urban area with modern fiber optic plant. In essence, this is the plan of the entrenched MSOs. Both the Commission and the Congress have repeatedly recognized the special importance of sports programming. RCN can provide further detail on this crucial issue if it would be helpful to the Subcommittee.

[19] The filing of this suit, *Cablevision of Boston, Inc. v. Public Improvement Commission, et al.*, 38 F. Supp. 2d 46 (D. Mass. 1999), *affirmed,* 184 F. 3d 88 (1999), neatly illustrates the anticompetitive motives of incumbents. In its suit Cablevision sought to have the Court stay further implementation by RCN of its business plan to use existing conduit and fiber to accelerate the roll-out of RCN's competitive OVS services in the City of Boston. The District Court denied any injunctive relief to Cablevision and found that Cablevision's case was not likely to succeed on the merits. Indeed, the Court characterized RCN as "a paradigm of the new entrant that Congress contemplated," and observed that:

> Cablevision has brought this suit, which In have preliminarily found has little chance of succeeding, just as the people of Boston have a realistic hope of receiving the benefits of fair competition in the cable television industry. Those benefits include more choices, better service and the prospect of lower prices. It

RCN in multi dwelling units (MDUs) where the building owners would not allow RCN to install its own wiring. Another incumbent, operating in the suburbs, sought acquisition of RCN's OVS data. In this instance, the FCC ruled partially in favor of the incumbent and partially in RCN's favor. The full Commission has been asked to reconsider its ruling and the U.S. Court of Appeals for the D.C. Circuit has been asked to review the FCC's decision.[20/]

» **New York City**

In New York City one of the incumbents, Cablevision, with some 2.7 million subscribers, controls programming rights for seven of the nine local professional sports teams[21/] and their venues. In early 1999, Cablevision revised its sports programming distribution system from satellite to terrestrial so as to preclude RCN's carriage of an important tier of extremely popular local sports programming. As RCN explained to the FCC, the loss of a full slate of local sports programming is a serious detriment in marketing RCN's new service.[22/] Another New York City

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would be contrary to the public interest to issue the preliminary injunction Cablevision now seeks. *Id.*, at 63.

The First Circuit Court of Appeals sustained the denial of stay, and found that the suit had little merit. Cablevision ultimately dismissed it with no decision on the merits.

[20] *See, e.g.*, *Time Warner Co. v. RCN BecoCom, LLC,* 15 FCC Rcd 1124 (2000), *recon. pending, appeal pending sub nom. RCN Telecom Services of New York, Inc. v. FCC*, D.C. Cir. Case No. 00-1043, filed February 9, 2000.

[21] These teams are the Yankees, Mets, Knicks, Nets, Rangers, Islanders, and the N.J. Devils. Cablevision owns outright two of these teams: the Knicks and the Rangers.

[22] "From the viewpoint of marketing, it is not good enough to say we offer 'most' local sports, or 'almost all' local sports. The public does not want to have to analyze what is missing; they want to know they will get it all, and this is especially important in a fiercely competitive environment such as the New York City MVPD market. Stated differently, having, for example, 85% of the local sports programming is not 85% as good as having 100%; it is a significant competitive disadvantage, and this is true whether we have 75% or 85% or even 95%." Reply of RCN Telecom Services of New York, Ex. A, pp. i-ii, June 28, 1999.

incumbent, Time Warner, sought access to RCN's competitively sensitive OVS data as Cablevision had done in Boston. In this instance the FCC ultimately ruled partially in favor of Time Warner and partially in favor of RCN.[23] Time Warner also declined to carry RCN's advertising on its Manhattan cable system, and for a long time refused to permit RCN to share apartment building inside cable wiring or to use Time Warner's poles to distribute its competitive programming.

» **Philadelphia**

In the Philadelphia metropolitan area the overwhelmingly dominant incumbent, Comcast,[24] acquired the great bulk of the local sports programming, as well as their venues, and threatened to deny RCN long term access.[25] The threat was mitigated only when Comcast faced Justice Department review of its plan to acquire Home Team Sports in the Washington area. To

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[23] This proceeding, consolidated with the Boston case described above, is subject to FCC reconsideration and Court of Appeals review.

[24] Comcast serves 1.9 million subscribers in the Philadelphia metropolitan area, about 90% of the total subscribership. Nationally it is one of the largest MSOs, with some 8.2 million subscribers.

[25] Through subsidiaries, Comcast owns a controlling interest in the Philadelphia Flyers National Hockey Team, the 76ers National Basketball team and two area arenas. It also holds a controlling interest in SportsNet which controls the great bulk of the professional area sports programming in the Philadelphia DMA. SportsNet carries approximately 66% of the games of the Philadelphia Flyers (NHL) and 73% of the Philadelphia 76ers' (NBA) regular season games as well as 49% of the Phillies' games (MLB). Comcast also owns exclusive rights to broadcast games of the Philadelphia Phantoms (American Hockey League), Philadelphia Wings (National Lacrosse League), and Philadelphia Kixx (National Professional Soccer League), as well as numerous football and basketball games of regional colleges and universities. This programming is distributed terrestrially to 2.7 million subscribers in the Philadelphia DMA. In its own promotional material Comcast has touted the strategic importance of SportsNet: "SportsNet provides a significant marketing advantage against satellite TV and other competitors."

this day, however, Comcast has refused to enter into a multi-year industry-standard contract for local sports programming in Philadelphia, but keeps RCN on a revolving three month renewal. This is no way to run a business and puts us at constant risk. Comcast also was successful in making RCN's effort to secure a franchise from the City of Philadelphia so difficult, expensive, and time consuming that RCN ultimately abandoned the effort altogether. This withdrawal removed some 200 million of potential investment in the City and the prospects of hundreds of jobs.

» **Washington, D.C.**

In the Washington, D.C. metropolitan area Media General, which operated in a number of suburban counties, followed the approach pioneered by Cablevision and Time Warner when faced with competition from RCN, and attempted to use the FCC's OVS rules to get access to proprietary and confidential business data of Starpower, RCN's affiliate. The matter is still pending before the Commission. In various D.C. metropolitan area jurisdictions incumbents have sought to delay the granting of franchises to Starpower and to influence local franchise authorities to impose financially and operationally unrealistic obligations on Starpower. Comcast has adopted the practice of paying MDU owners up front to sign contract renewals, and seeks exclusive agreements wherever it can get them. In northern Virginia in particular, Starpower has been locked out of numerous buildings because the incumbent has the benefit of an exclusive right to provide service to that structure.

## IV. CRITICAL ISSUES

There are other impediments to the successful roll-out of competitive cable service. These include the following:

» **Denial of Access to Inside Wiring**

Competitive cable providers must have access to tenants in apartment and office buildings to survive. About 30-35% of the total population lives in multiple dwelling units (MDUs), such as apartments, cooperatives or condominiums. The ability to serve this sector of the market is crucial because it is generally more profitable due to the large number of subscribers in each MDU. For a start-up company, MDU access is especially vital since it allows a more rapid build up of operating revenue than developing market share by building out service to individual homes. However many MDU owners fear that new entrants will disrupt the building to install their own wiring to each apartment, and incumbents frequently claim that they own the existing wiring and by law or contract have the right to remain in the building and need not share their wiring with the newcomer. The result is that the new competitor is effectively blocked or, at the least, significantly impeded in this especially valuable segment of the market. RCN has encountered this problem in every metropolitan area.

The inside wiring issue has been a problem for cable overbuilders for some time. Section 624(i) of the Communications Act,[26/] which Congress adopted in the Cable Act of 1992, directed the FCC to adopt rules governing the disposition of wiring within the cable subscriber's home when such subscriber voluntarily terminates service. The FCC subsequently adopted such rules setting forth the rights to such wiring of the cable provider, the resident, and the building owner,

[26] 47 U.S.C. § 544(i).

and any new competitor. However, the FCC restricted the application of these new rules to the wiring inside individual units and up to 12 inches beyond such units.[27/] In 1997 the Commission adopted rules governing access to home run wiring in cases where an incumbent does not have an enforceable right to remain on the property.[28/]

In formulating its inside wiring rules, the FCC anticipated that incumbent cable companies, especially in the case of service to MDUs, might not cooperate with new video competitors and adopted rules specifically designed to address such situations. The Commission has therefore gone to great lengths to resolve the many complex bottleneck issues related to inside wiring within MDUs, and has adopted regulations that attempt to moderate the anticompetitive inclinations of incumbents. In explaining these procedures, the Commission accurately described some of the problems RCN has faced:

> [W]e believe that disagreement over ownership and control of the home run wire substantially tempers competition. The record indicates that, where the property owner or subscriber seeks another video service provider, instead of responding to competition through varied and improved service offerings, the incumbent provider often invokes its alleged ownership interest in the home run wiring. Incumbents invoke written agreements providing for continued service, perpetual contracts entered into by the incumbent and previous owner, easements emanating from the incumbent's installation of the wiring, assertions that the wiring has not become a fixture and remains the personal property of the incumbent, or that the incumbent's investment in the wiring has not been recouped, and oral understandings regarding the ownership and continued provision of services. Written agreements are frequently unclear, often having been entered into in an era of an accepted monopoly, and state and local law as to their meaning is vague. Invoking any of these reasons,

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[27] See 47 C.F.R. §§ 76.801-2 and 76.5(mm).

[28] *See Telecommunications Services, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, Report and Order and Second Further Notice of Proposed Rulemaking,* CS Docket No. 95-184 and MM Docket No. 92-260, 13 FCC Rcd 3659 (1997) ("Inside Wiring Order"), *recon. pending and appeal pending*, *Charter Communications, Inc. v. FCC*, Case No. 97-4120 (8th Cir.).

> incumbents often refuse to sell the home run wiring to the new provider or to cooperate in any transition. The property owner or subscriber is frequently left with an unclear understanding of why another provider cannot commence service. . . . The result, regardless of the cable operators' motives, is to chill the competitive environment.[29/]

Unfortunately, the Commission's inside wiring rules are grossly deficient. They are limited to instances in which the incumbent does not have a legal right to retain its wiring on the premises. In many states the incumbent cable companies have persuaded the legislature to adopt what are known as "mandatory access laws." These laws, with variations from state to state, grant cable companies a legal right to install their service in MDUs even over the objection of the building's owners or managers.[30/] Because the mandatory access laws were crafted only for the benefit of Title VI cable companies, they are one-sided relics of a by-gone era and have been relied on repeatedly by the incumbents to claim that they own inside wiring, even when they can not provide any proof of ownership. For its part, the Commission has declined to draft its rules so as to preempt these anticompetitive statutes, instead expressing hesitation about the scope of its authority to do so.[31/]

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[29] *Id.* at ¶ 38 (footnotes omitted).

[30] There are about 18 such statutes.

[31] Report and Order and Second Further Notice of Proposed Rulemaking, in Docket No. 95-784, MM Docket No. 92-260, at page 81-101.

» **Program Access**

Section 628 of the Communications Act,[32] adopted in the Cable Act of 1992, is vitally important to the development of broadband competition. Section 628(b) was enacted in response to widespread difficulties experienced by competitors gaining access to programming controlled by the incumbent cable companies. The statute therefore provides that vertically integrated cable companies cannot engage in unfair methods of competition or unfair or deceptive practices in an effort to hinder competitors' access to programming controlled by the integrated cable companies. It also prohibits discrimination in the terms under which such programming is made available to competitors.[33] The FCC however, has interpreted the statute to be inapplicable to instances in which such programming is distributed by terrestrial, as compared with satellite, distribution.[34] This interpretation of the law makes no practical sense whatever, and has created a giant loophole which is being used by a number of incumbent cable companies to shift

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[32] 47 U.S.C. § 548.

[33] *See* 47 U.S.C. § 548(b) and § 548(c)(2)(B). The following excerpt from the legislative history of section 628 containing remarks by Representative Tauzin provides considerable insight into Congressional intent: "[My] amendment, very simply put, requires the cable monopoly to stop refusing to deal, to stop refusing to sell its products to other distributors of television programs. In effect, this bill says to the cable industry, 'You have to stop what you have been doing, and this is killing off your competition by denying it products.'. . . Programming is the key. . . . Without programming, competitors of cable are ... stymied and who is the big loser? The big loser is everyone in America who pays a cable bill. . . ." What does it mean? It means that cable is jacking the price upon its competitors so high that they can never get off the ground. ***In some cases they deny programs completely to those competitors to make sure they cannot sell a full package of services. So the hot shows are controlled by cable***. . . . It is this simple. There are only five big cable integrated companies that control it all. My amendment says to those big five, "You cannot refuse to deal anymore.'" 138 Cong. Rec. H6533-34 (July 23, 1992) (statement of Rep. Tauzin) (emphasis added).

[34] *See, e.g. RCN Telecom Services of New York, Inc., v. Cablevision, et al.*,14 FCC Rcd 17093 (CSB, 1999), *application for review pending.*

programming previously distributed by satellite to terrestrial transmission and then to refuse to make it available to local competitors.[35/]

As I have noted above, in three of our principal markets we have had serious concerns about access in particular to local sports programming. This is not an accident. The cable industry appears to have adopted ownership or control of local sports programming as a device to capture or assure dominance in local markets. It has long been recognized that sports programming is crucial.[36/] Cablevision is not only dominant in the New York City sports programming market but has investments in a wide variety of sports programming activities.[37/] Industry commentators recognize the value of the sports programming monopoly to cable operators:

> [P]rofessional sports leagues have further extended their economic power by allying with other monopolies in related markets. The leagues' relationships with broadcast networks and cable systems have limited competition in local media as well as sports markets. The New York Yankees, for instance, have granted Cablevision the exclusive right to broadcast games in the New York area in exchange for a payment of $486 million over twelve years. Such a relationship, however, does not only increase the Yankees' monopoly profits. By giving Cablevision exclusive control over sports programming critical to any cable system's success, the Yankees have

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[35] *See, e.g., id, and DirecTV, Inc., et al. v. Comcast*, 15 FCC Rcd 22802 (2000).

[36] *See, e.g.*, *Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992; Inquiry into Sports Programming Migration*, Final Report, 9 FCC Rcd 3440 (1994).

[37] According to Multichannel News, Cablevision's Rainbow Media Holdings Inc. and Fox/Liberty Networks (with which Cablevision has sports affiliations) "either own or are affiliated with more than 20 regional sports networks that have programming deals with most professional teams: 25 of 30 MLB teams, 26 of 29 National Basketball Association teams and 19 of 26 National Hockey League squads." Multichannel News, May 4, 1998, p. 74. The article also comments that such programming is a "gold mine" for the regional sports networks, "[L]ocal events often generate the highest ratings of any cable program... ." *Id.*

allowed Cablevision to preclude potential competitors from entering the New York cable market.[38/]

The FCC's narrow interpretation of Section 628 has acted as a substantial barrier to entry and we urge Congress to amend the law so that the method of program distribution is irrelevant to the applicability of the program access provisions. Another important provision of section 628 limits the ability of vertically integrated cable companies which own programming to enter into exclusive agreements that result in denying such programming to new competitors.[39/] However, this provision sunsets on October 5, 2002, unless the Commission determines in a rulemaking that continuing that provision beyond the termination date is necessary to preserve and protect competition and diversity in the distribution of video programming.[40/] Failure to extend those provisions would be a disaster for new entrants like RCN. In any case, however, it is vitally important that all provisions of section 628 are vigorously enforced by the FCC.

» **Difficulty in accessing local rights-of-way on fair and reasonable terms.**

Competitive cable providers must have access to local rights-of-way to deploy their networks to consumers, whether by attaching to existing utility poles or using underground conduit. Sections 253 and 621 [41/] of the Communications Act leave control over local franchising and local rights-of-way to municipal or other local authorities subject to broad principles of

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[38] Piraino, *supra*, at 891 (footnotes omitted). Cablevision has tied up programming rights to the Mets for 30 years, and the Yankees for 12 years. Possessing the rights for seven of the nine teams in the New York metro area has allowed Cablevision to triple its previous subscribership. *Id.,* at 919.

[39] 47 U.S.C. § 548(c)(2)(D).

[40] 47 U.S.C. § 548(c)(5).

[41] 47 U.S.C. § § 253, 541.

federal law. It is extremely common for local cable regulators to use the need to secure local authority as an occasion to extract substantial revenue or valuable concessions such as free municipal service from new competitors during franchise negotiations. Numerous FCC and court cases have addressed the scope of local rights to impose such charges or obligations under federal and state law. RCN has suggested to the Commission that it establish federally-mandated standards governing access to such public rights-of-way and require local authorities to adhere to reasonable standards of timeliness and equitable treatment in granting such access. The Commission has not yet acted on this proposal. At the moment there are few clear rules which are uniformly interpreted and applied in all areas.

» **Adverse administrative and judicial action.**

Numerous recent decisions of the Cable Services Bureau are anticompetitive and inhibit, rather than encourage, the development of broadband competition. Congress should encourage the FCC to enforce the pro-competitive provisions of existing law. Some of these are described above. In a broader context, RCN has been urging the Commission to take a more dynamic and interventionist approach to the preservation and encouragement of cable overbuilding by construing its rules in a more procompetitive fashion, and by considering the adoption of rules or policies to facilitate the transition to meaningful competition. Although the Commission frequently acknowledges that problems may exist in the implementation of broadband competition, it has often declined to address them in a meaningful way and frequently requires far too long to resolve individual matters.[42/]

[42] In one instance, involving RCN's September 1998 request for an interpretive ruling concerning access to MDUs, the Cable Services Bureau has not yet acted.

The Federal Courts have also issued a number of decisions which have inhibited the development of broadband competition. As described above, section 653 of the Communications Act created a new form of cable provider, the OVS which was intended to expedite broadband competition. The FCC developed rules implementing section 653 and provided that, consistent with Congressional intent to encourage new competition, OVS operators could secure an FCC certification within 10 days and need not be franchised by local communities. This streamlining of regulatory hurdles promised to significantly accelerate the development of cable competition.

However, at the urging of local governments and the cable industry, the 5th Circuit Court of Appeals struck down the rule eliminating the need for a local franchise.[43/] By doing so it severely diminished one of the principal advantages of the OVS mode of operation, and in fact OVS has not been widely exploited by new competitors. There are other federal district and appellate court decisions which have interpreted various provisions of the Communications Act in a fashion which inhibits the development of MVPD competition. Among these are *Gulf Power v. FCC (Gulf Power II)*,[44/] which denies to cable or telecom companies providing internet access a federally-mandated right to attach their wires to such utility poles or conduits and the benefits of regulated rates for such use of utility poles or conduit for the distribution of their signals. We

[43] *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999).

[44] 208 F. 3d 1263 (11th Cir. 2000), *reh. den*. 226 F.3d 1220, *cert. granted sub nom. FCC v. Gulf Power Co.*, 121 S.Ct. 879 (Jan. 22, 2001) (No. 00-843).

believe both these decisions seriously misconstrue federal law and have the effect of eviscerating Congress' procompetitive purposes.[45/]

In sum, we are seeing competitive entry into the MVPD market, primarily from DBS operators and RCN, with a few other cable overbuilders. However the market remains highly concentrated and indeed the 80% of the market still served by traditional cable entities is becoming more and more concentrated as time goes by. Looking back over the five years since passage of the pro-competitive Telecommunications Act of 1996, we can see in retrospect that significant barriers to full competitive entry persist, and that the competition which has emerged is in response to the opportunities created by, and fostered by, forward-looking legislation and regulation. The bottom line issue here, of course, is not the fate of RCN; we will continue to deploy our financial and human resources to compete with the entrenched monopolists. The bottom line is the consumer, and it is clear from these five years of experience that the consumer benefits tremendously from the emergence of competitors. We hope this Subcommittee, and others in the Congress, will continue to assure that the competitive opportunity remains alive and well.

Thank you very much.

[45] Many other federal court decisions have construed Communications Act provisions in mutually inconsistent ways, thereby creating uncertainty about their practical meaning.